Supreme Court, U.S.
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No. 99-297

In the Supreme Court of the United States

OCTOBER TERM, 1999

EMANUEL HAZANI,

Petitioner,

v.

OKI ELECTRIC INDUSTRY CO. LTD., OKI AMERICA, INC., SAMSUNG GROUP, SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., SAMSUNG SEMICONDUCTOR, INC., MITSUBISHI ELECTRIC CORPORATION, MITSUBISHI ELECTRONICS AMERICA, INC., NEC CORPORATION, AND NEC ELECTRONICS, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Did the federal appeals court correctly determine that it lacked appellate jurisdiction by reason of petitioner's failure timely to file a notice of appeal, or timely to file any motion that would toll the time, or extend the time, for filing a notice of appeal?

PARTIES TO THE PROCEEDING

Pursuant to Supreme Court Rule 14.1(b), all parties appear in the caption of the case on the cover page, with the exception that Samsung Group does not exist as a legal entity.

RULE 29.6 STATEMENT

Respondents state that all of their parent corporations and any publicly held company owning 10% or more of the Respondent corporations' stock are as follows:

Samsung Electronics Co. Ltd., a publicly-traded corporation organized under the laws of the Republic of Korea has no parent or publicly-traded affiliates as those terms are commonly employed under United States law. Samsung Electronics America, Inc. and Samsung Semiconductor, Inc. are not publicly-traded. Samsung Group does not exist as a separate legal entity.

Mitsubishi Electric Corporation and Mitsubishi Electronics America, Inc. have the following publicly held parent, affiliate or subsidiary companies: SPC Electronics Corporation; The Kodensha Corporation; Optec Dai-ichi Denko Co., Ltd.; Nihon Kentetsu Co., Ltd.; Toyo Takasago Dry Battery Co., Ltd.; Shizuki Electric Corporation; Kanaden Corporation; Ryoden Trading Co., Ltd. Oi Electric Co., Ltd.; Mansei Corp.; Shihlin Electric & Engineering Corp.; China Electric Mfg. Corp.; Kang Yong Electric Public Co., Ltd.

The parent companies, subsidiaries (except wholly owned subsidiaries), and affiliates that have issued shares to the public, of the NEC Respondents are: Nippon Electric Glass Co., Inc.; Japan Aviation Electronics Industry, Ltd.; Tokyo Communication Equipment Co., Ltd.; Nitsuko, Ltd.; NEC Systems Integration & Construction, Ltd., Anritus Corporation; Ando Electric Co., Ltd.; Nippon Avionics Co.,

Ltd.; Nippon Electric Industry, Co., Ltd.; Nippon Computer System Co., Ltd.; Tama Electric Co., Ltd.

OKI Electric Industry Co., Ltd. presently owns more than five percent of the shares of each of the following companies, which are publicly traded in Japan: Keihin Corporation; OKI Electric Installation Co., Ltd.; Kinseki Ltd.; Okaya Electric Industry Co., Ltd.; OKI Electric Cable Co.; Ltd.; Taiko Electric Works Ltd.; and Tamura Electric Works Ltd.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

The Petition mischaracterizes both the decision of the court of appeals below and the decisions of eight other circuit courts in an attempt to manufacture an intercircuit conflict where none exists. This case presents no substantial unsettled question of federal law. Accordingly, the Petition lacks merit and should be denied.

STATEMENT OF PRIOR PROCEEDINGS

On May 4, 1998, Respondents filed in the U.S. District Court for the District of New Jersey a Joint Motion

for Summary Judgment of Invalidity of Claims 1, 2, 4-13, 15-20 and 22-28 of U.S. Patent 5,166,904 ("the '904 patent") issued to Petitioner and a Joint Motion For Summary Judgment Of Non-Infringement Of Claim 14 of the '904 patent. The issues set forth in these summary judgment motions had been fully litigated in prior related litigation involving the same patent before the U.S. International Trade Commission ("ITC") pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. The ITC had held, and the Federal Circuit affirmed, that the '904 patent claims were invalid as anticipated by the prior art and that claim 14 was not infringed. *See Hazani v. United States Int'l Trade Comm'n*, 126 F.3d 1473 (Fed. Cir. 1997), *pet. for reh'g and suggestion for en banc review denied,* 1998 U.S. App. LEXIS 1370 (Fed. Cir. January 22, 1998), *petition for cert. filed,* 68 U.S.L.W. 3138 (U.S. Aug. 12, 1999)(No. 99-297).[1]

Hazani requested, and was granted, three extensions of time to file his opposition to the summary judgment motions, but he failed to file an opposition within the time specified in the Orders granting these extensions. On May 19, 1998, Hazani moved *pro se*[2] for an uncontested fifteen

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[1] The ITC's ruling on patent issues, as affirmed by the Federal Circuit, is persuasive authority in a plaintiff's later district court patent infringement suit against defendants based on the same patent. *See, e.g., Texas Instruments, Inc. v. Cypress Semiconductor Corp.*, 90 F.3d 1558, 1568-69 (Fed. Cir. 1996), *cert. denied,* 520 U.S. 1228 (1997). To the extent the Federal Circuit has already ruled on a matter on review of an ITC decision, a district court, and subsequent appellate panel on review of a district court decision, may not deviate from that prior holding short of thoroughly justified grounds. *Id.* at 1569.

[2] Hazani was represented by patent counsel in the prior ITC litigation. Hazani was also represented by counsel in the parallel District Court action until March 14, 1996, when the Court granted Hazani's counsel's

(15) day extension of time to file his opposition to Respondents' summary judgment motions in the District Court. On the day the oppositions were due, June 8, 1998, Hazani moved for another extension of time, requesting an additional 90 days to oppose the summary judgment motions. The District Court again extended Hazani's time to respond by fifteen (15) days and warned him that failure to file an opposition within that time period would result in the court treating the summary judgment motions as unopposed. Once again on the day his opposition was due, July 6, 1998, Hazani filed yet another motion to extend time, which the District Court granted allowing Hazani until July 14 at 4 p.m. to file his opposition. Again, the District Court admonished that no further extensions of time would be granted. Upon Hazani's fourth application to extend time, filed on July 27, three days after the opposition was due, the District Court denied the request by Order docketed July 31, 1998, and informed Hazani that the summary judgment motions would be treated as unopposed.

On August 13, 1998, the District Court granted defendants' motions for summary judgment and disposed of the case on the merits. Pet. App. C ("Aug. 13 Order"). On August 21, 1998 the case was closed.

During the ten day period following the August 13 Order, Hazani filed no motion that would have tolled the period for filing an appeal under Appellate Rule 4(a)(4). Instead, on August 31 and September 8, 1998, Hazani filed motions to extend the time to file a Rule 59(b) motion for reconsideration of the final judgment on the merits. On September 11, 1998, the District Court denied those motions on the ground that Hazani had not opposed the summary

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motion to withdraw its appearance. On April 22, 1996, Hazani filed notice to the District Court that he would proceed *pro se*.

judgment motions even after the court granted him three extensions of time to do so. Again, on September 11, Hazani renewed his request for an extension of time to file a motion to reconsider the August 13 Order which was denied on October 2, 1998. Hazani's repeated motions for extensions of time to file a motion under Fed. R. Civ. P. 59(b) do not toll the time for appeal pursuant to Fed. R. Civ. P. 6(b) contrary to Petitioner's allegation.

On September 17, 1998 the District Court issued an Order directing that, absent leave of court, no further filings from Hazani would be accepted other than a notice of appeal. The court's Order noted that the case was closed on August 21, yet Hazani persisted in presenting additional material for filing without leave of the court to do so.

The District Court explicitly warned Hazani in the September 17 Order that he had a limited time to appeal the final judgment entered by the District Court. Hazani, at his peril, chose to ignore the District Court's reminder regarding the strict time limitation for filing an appeal.

Hazani failed to file a notice of appeal within the mandatory 30 day period following judgment on the merits. Moreover, after the 30 day period for filing a notice of appeal had passed, Hazani never filed a motion for an extension of time to file an appeal pursuant to Appellate Rule 4(a)(5). Consequently, Hazani's right to appeal, and right to request an extension to file an appeal out of time, of the District Court's judgment on the merits expired sixty days after the August 13 Order was entered.

Hazani's right to appeal could not be legally revived by his later submissions to the District Court. Without seeking leave of the District Court as required by the September 17 Order, Hazani separately submitted to the

District Court on December 1, 1998, a brief in opposition to Respondents' motion for summary judgment and a Rule 60(b) motion.[3] Despite the fact that Hazani's opposition brief was grossly untimely, in an abundance of caution, and in view of Hazani's *pro se* status, the District Court, ruled by Order entered on December 8, 1998, that Hazani's opposition failed to set forth any grounds for a change in view of the Federal Circuit regarding Hazani's patent and therefore held that "there is no injustice in not reviewing Mr. Hazani's grossly untimely papers. The case remains closed." December 8, 1998 Order at 1, Pet. App. B.

Thereafter, on January 7, 1999, one hundred forty-seven (147) days after the August 13 Order disposing of Hazani's case on the merits, Hazani filed his untimely notice of appeal of nearly all orders rendered adverse to him by the District Court, including the August 13 and December 8 Orders.[4]

Respondents promptly filed with the Federal Circuit a joint motion to dismiss the appeal on March 9, 1999. Respondents argued that the appellate court lacked jurisdiction to review the final judgment and the various

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[3] Because the District Court's September 17 Order directed that no further filings in the case would be accepted absent leave of the court, Hazani's documents of December 1, submitted without leave of court, do not appear on the District Court's docket sheet.

[4] Hazani's Notice of Appeal filed January 7, 1999 includes the following orders: a May 14, 1998 order denying Hazani's motion to transfer venue; the August 13 Order granting summary judgment; an August 17 order denying Hazani's motion to disqualify counsel; the September 11 and October 2 orders denying Hazani's motions for extension of time to file for reconsideration of summary judgment; and the December 8 order not to review Hazani's opposition to Respondents' motions for summary judgment.

procedural orders on the ground that Hazani failed to file a timely notice of appeal and did not file any motion to extend his time for appeal.

The Federal Circuit, by Order dated May 14, 1999, agreed with respondents that Hazani's appeal on the merits of his case was untimely. Accordingly, the appellate court treated his request for review of his case on the merits as a petition for writ of mandamus. The appellate court, on mandamus, declined to disturb the District Court's orders entered prior to December 8, 1998 based on *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 8 n.6 (1983) in which this Court held that that it will not "engage in extraordinary review by mandamus in aid of its jurisdiction . . . when it can exercise the same review by a contemporaneous ordinary appeal." May 14, 1999 Order, at 3, Pet. App. A.

Further, the Federal Circuit treated Hazani's request for review of the December 8 Order in which the District Court refused to review Hazani's submissions as a petition for writ of mandamus to direct the District Court to file and rule on his papers. Here, the appellate court held that Hazani failed to show his right to a writ was clear and indisputable. The Federal Circuit found no abuse of discretion in the District Court's refusal to file or consider Hazani's opposition brief or Rule 60(b) motion, submitted without leave of court for two reasons. First, despite having received three extensions of time to file an opposition, Hazani failed to do so. Second, despite the District Court's explicit instructions, Hazani failed to request leave of court before submitting his untimely opposition brief and Rule 60(b) motion. Accordingly, based on this Court's ruling in *Whitaker v. Superior Court*, 514 U.S. 208, 210 (1995), the appellate court held the district court's refusal to file or

consider Hazani's submissions did not constitute an abuse of discretion.

REASONS FOR DENYING THE WRIT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The fact-intensive questions presented in the petition involve the application of settled principles to the particular record in this case and do not warrant this Court's review. Petitioner offers no persuasive rationale to upset the appeals court's ruling that Petitioner failed to preserve his right of appeal despite having been warned of the limited time for appeal.

I.
This Case Involves No Conflict Among the Circuits on Any Important Question Of Federal Law

A. There is No Conflict Among the Courts of Appeals Regarding the Deadline for Filing An Appeal

Although Hazani cites a sprinkling of authorities from other jurisdictions and this Court, *see* Pet. at 11, he offers no meaningful analysis of why those decisions supposedly conflict with the decision of the Federal Circuit in this case. In fact, no conflict exists.

There is no merit to Petitioner's contention that the court of appeals miscalculated the time for filing a notice of appeal, by misapplying the tolling provisions of Fed. R. App. P. 4(a)(4), and thereby diverged from the decisions of the majority of other courts of appeals. Petitioner's primary

argument is that the Federal Circuit's decision is in conflict with the Eleventh Circuit's decision in *Advanced Estimating System Inc. v. Riney,* 77 F.3d 1322 (11th Cir. 1996) because the Federal Circuit failed to hold that Hazani's Rule 60(b) motion, submitted to the District Court on December 1, 1998, tolled the time for filing an appeal of the August 13 final judgment. Petitioner assigns this error based on an incomplete quotation of the holding of the Eleventh Circuit in *Advanced Estimating System.* That quotation is as follows:

> "Despite the thirty day time restriction mandated by Rule 4, the running of the appeal period may be tolled by filing one of the motions listed in Rule 4, including a Rule 59 or 60 motion."

Pet. at 11 (quoting *Advanced Estimating Sys.,* 77 F.3d at 1323). Based on this quotation, Petitioner argues that his Rule 60(b) motion, filed 110 days after entry of judgment, tolled the time for filing a notice of appeal of the August 13 Order.

Petitioner's selective quotation omits the remainder of the Eleventh Circuit's holding that is absolutely fatal to his argument. The full quotation from the Eleventh Circuit decision goes on to hold that unless filed within ten days of the final judgment, Rule 59 and 60 motions do not toll the time for appeal. The full quotation is as follows:

> Despite the thirty day time restriction mandated by Rule 4, the running of the appeal period may be tolled by filing one of the motions listed in Rule 4, including a Rule 59 or 60 motion. Only if such a motion is filed timely, however, will it successfully suspend the appeal period. Fed. R. App. P. 4(a)(4). Untimely motions under Rules 59 and 60 will not toll

> the time for filing an appeal. *Gribble v. Harris,* 625 F.2d 1173, 1174 (5th Cir. 1980). Rule 59 and 60 motions are timely if filed within ten days of entry of final judgment. Fed. R. Civ. P. 59(b) (a motion for new trial shall be served not later than ten days after the entry of judgment); Fed. R. App. P. 4(a)(4)(F) (a Rule 60 motion will suspend the period of appeal if the motion is served within ten days after the entry of judgment). The appellants filed their Rule 59 and 60 motions twelve business days after entry of judgment. . . . Accordingly, as appellants concede, their Rule 59 and 60 motions were untimely and thus did not extend the time for filing a notice of appeal."

Advanced Estimating Sys., 77 F.3d at 1323-24 (footnote omitted).

Pursuant to the principles set forth in *Advanced Estimating Systems,* the authority relied upon by Petitioner, Hazani's Rule 60(b) motion, submitted months after the time for filing an appeal had expired, could not have tolled the time for filing an appeal of the August 13 judgment on the merits pursuant to Appellate Rule 4(a)(4). Accordingly, there can be no doubt that the Federal Circuit's holding that Hazani's appeal on the merits is untimely, is based on a correct reading of Rule 4(a)(4) and is entirely consistent with the Eleventh Circuit's holding in *Advanced Estimating System* concerning the operation of this tolling provision.

Equally meritless is Hazani's contention that Fed. R. Civ. P. 6(b) provides authority for a District Court to set aside the 30 day time limit for appeal of the August 13 Order. This Court has held the 30 day time limit is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.,* 459 U.S. 56, 61 (1982). Notwithstanding this Court's ruling that appellate jurisdiction critically depends upon a timely

notice of appeal, Hazani argues that his various motions invoking Fed. R. Civ. P. 6(b) may effectively set aside this jurisdictional requirement. It is Hazani's belief that his requests for an extension of time to file for reconsideration of the final judgment under Rule 59(b) (the first of which was filed 18 days after entry of judgment) and his motion for an extension of time to file an opposition brief under Rule 60(b) (submitted 110 days after entry of judgment, without obtaining leave of court), somehow tolled the time for filing an appeal of the August 13 final judgment on the merits. *See* Pet. at 12. Hazani seems to argue that Fed. R. Civ. P. 6(b) provides independent authority for the District Court to enlarge the time for filing an appeal when a party requests an extension of time to file a motion under Rules 59(b) or 60(b) outside the 10 day period mandated by the rules. A careful parsing of Rule 6(b) read in conjunction with Rules 59(b) and 60(b)of the Federal Rules of Civil Procedure and Appellate Rule 4(a)(4), unambiguously contradicts Hazani's argument.

Fed. R. Civ. P. 6(b), by its express terms, provides discretionary authority to the District Court to permit the filing of papers outside established deadlines where the failure to comply with the deadlines was the result of excusable neglect, with two important exceptions applicable here, i.e., the filing of Rule 59(b) and 60(b) motions. Specifically, Rule 6(b) provides, in pertinent part:

> (b) Enlargement. When by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for

> taking any action under Rules . . . 59(b) . . . and 60(b), ... except to the extent and under the conditions stated in them.

The express language of Fed. R. Civ. P. 6(b) thus states the principle, that Rule 6(b) cannot be used to enlarge the time limit for filing an appeal based on motions filed pursuant to Rules 59(b) and 60(b) except to the extent permitted by those rules. *See Browder v. Department of Corrections,* 434 U.S. 257, 262 (1978) ("Rule 6(b) prohibits the enlargement of the time period prescribed in [Rule 59(b)]."). As noted by the Eleventh Circuit in *Advanced Estimating System* quoted above, in order to toll the time for appeal, motions based on Rules 59 and 60 must be filed within 10 days of entry of judgment in order to effectively toll the time for appeal. *Advanced Estimating Sys.,* 77 F.3d at 1323-24. There is no dispute that Hazani did not file any motion pursuant to Rules 59(b) or 60(b) within the 10 day period so as to toll the time for appeal. Accordingly, Hazani cannot rely on Rule 6(b) to circumvent the rules affecting the finality, and the mandatory period for appeal, of the August 13 final judgment on the merits.

Similarly deficient is Hazani's citation to Fed. R. App. P. 4(a)(5) to support his argument that his December 1 Rule 60(b) motion tolled the time for filing an appeal. Hazani argues that his motion qualifies as a motion that may toll the appeal period under the excusable neglect holdings of the Eleventh Circuit in *Advanced Estimating System,* as well as eight circuit courts cited therein. Thus, Hazani finds that the Federal Circuit's decision is not in accord with these circuit court rulings. Again, Hazani's argument mischaracterizes the rulings of the circuit courts on excusable neglect so as to manufacture an intercircuit conflict.

Appellate Rule 4(a)(5) permits a District Court to extend the time to file a notice of appeal based on a showing of excusable neglect if the party so moves no later than 30 days after the time for filing an appeal has expired. Fed. R. App. P. 4(a)(5). This Rule, on its face, does not apply to Hazani's situation because Hazani never filed a motion to extend the time for filing an appeal pursuant to Appellate Rule 4(a)(5). Thus, Hazani's citation to the *Advanced Estimating System* decision of the Eleventh Circuit, which is an appeal of a denial of a Rule 4(a)(5) motion, is unavailing since it is clearly factually distinguishable on this precise procedural issue.

Moreover, the legal point which Hazani identifies as the source of the alleged circuit split based on *Advanced Estimating System,* and cases cited therein, is entirely irrelevant to the issue before this Court. *Advanced Estimating System* cites with approval the holdings of eight other appellate courts on the legal point that this Court's decision in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership,* 507 U.S. 380 (1993), construing the meaning of "excusable neglect" under Bankruptcy Rule 9006(b)(1), applies with equal force to the term "excusable neglect" as it appears in Appellate Rules 4(a)(5) and 4(b). As discussed above, however, the Federal Circuit had no occasion to decide the question of whether excusable neglect justifies Hazani's failure to file a timely appeal pursuant to Fed. R. App. 4(a)(5), because Hazani filed no such motion with the District Court at any time. Since the District Court neither received, nor ruled upon, any motion requesting an extension to file a notice of appeal out of time, the issue of "excusable neglect" under Fed. R. App. P. 4(a)(5) never arose nor was decided by the Federal Circuit. Accordingly, there is no conflict between the Federal Circuit's decision in the appeal below, and the ruling of the Eleventh Circuit in *Advanced Estimating System,* and the cases cited therein

Even if the Court were to treat Hazani's Rule 60(b) motion as if it were a Rule 4(a)(5) motion, that motion would clearly be untimely under that rule inasmuch as it was submitted to the District Court 110 days after entry of judgment. Appellate Rule 4(a)(5) authorizes a court to extend the time for appeal, but only if a motion requesting an extension is filed within 30 days after the period for appeal has expired. Thus, Hazani's argument that Rule 4(a)(5) provides relief against his failure timely to file a notice of appeal must fail.

B. The December 8 Postjudgment Order of the District Court Was Correctly Deemed to Be A Non-Appealable Order

Hazani further assigns error to the Federal Circuit's decision on the ground that the appellate court did not find Hazani had a right to appeal the District Court's December 8 Order, notwithstanding the timely filing of a notice of appeal with respect to that particular order. Hazani's argument is not persuasive inasmuch as Hazani has no right to appeal a ministerial order that pertains to the District Court's control of its docket.

The December 8 Order was correctly interpreted by the Federal Circuit as a refusal to file or consider Hazani's grossly untimely opposition to the summary judgment motions or his Rule 60(b) motion, without an accompanying motion for leave to file these documents. May 14 Order at 3, Pet. App. A. The District Court's refusal to accept Hazani's submissions without leave constitutes an order to enforce the court's prior September 17 Order, which imposed the express requirement that no further filings would be accepted absent leave of the court. Simply put, Hazani's failure to comply with the September 17 Order resulted in the rejection of his

submissions in the December 8 Order. The December 8 Order does not purport to decide Hazani's case on the merits, nor does it have any significance to the case below beyond the fact of the Court's action in controlling its own docket. The Federal Circuit recognized that this type of ministerial order is not appealable under any provision of law, and that courts may properly impose such orders as are necessary to control their dockets when litigants persevere in filing documents so as to divert the limited resources of the court. May 14 Order at 4, Pet. App. A (citing *Whitaker v. Superior Court*, 514 U.S. 208, 210 (1995)). In *Whitaker*, this Court likewise directed the clerk of the court to refuse to accept further petitions for certiorari filed by a *pro se* petitioner in a noncriminal matter so that the Court could devote its limited resources to the meritorious claims of other petitioners. *Id.* Hazani cites no authority, either in his Petition or in the papers filed with the appeals court, that would have permitted the Federal Circuit to review this order on appeal.

Hazani's contention that the District Court should have overlooked his failure to obtain leave properly pursuant to the September 17 order is unpersuasive.[5] Pet. at 9. The District Court had already bent over backwards to accommodate Hazani in every way, in view of his *pro se* status, to assure that he had a full and fair opportunity to address the summary judgment motions on the merits and to advise him of his right to appeal by timely filing a notice of

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[5] Hazani's argument that he had a right to appeal the December 8 Order because he had included within his Rule 60(b) motion a request for leave to file the untimely opposition brief is meritless. Hazani's argument is nothing more than post hoc rationalization for his failure to comply with the simply stated requirement set forth in the District Court's Order of September 17 regarding the rejection of filings without leave after the case was closed. In view of Hazani's deliberate disregard of the Court's September 17 Order, the District Court correctly enforced its Order when it rejected Hazani's submissions on December 8.

appeal. First, the District Court granted Hazani's three motions for an extension of time to file opposition papers. In the last two orders granting extensions, the court warned that failure to submit opposition papers would result in treatment of the motions as unopposed. Hazani chose not to file opposition papers despite these warnings. The Court, having received no opposition from Hazani, had no choice but to issue its final judgment on the merits. Second, after final judgment was entered, the District Court expressly reminded Hazani of the limited time to file an appeal in its September 17 Order. Again, Hazani chose to disregard the District Court's guidance regarding the necessity of preserving his right to appeal by timely filing a notice of appeal to his detriment.

Finally, Petitioner, without justification, asserts that the Federal Circuit erred by failing to deem the December 8 Order as the District Court's determination, after review of Hazani's Rule 60(b) motion and opposition brief, that Hazani's opposition brief had no meritorious claim. Pet. at 10. By this reasoning, Hazani wrongfully attempts to convert a purely ministerial order into one which is a final order subject to appeal. Hazani's attempt to manufacture appellate jurisdiction, however, must fail because it is directly contravened by the District Court's clear statement in the December 8 order. The Court stated therein that "there is no injustice in not reviewing Mr. Hazani's grossly untimely papers. The case remains closed." The plain words of the Order itself dispel any notion that the December 8 Order was a "review" of Hazani's papers as Hazani believes. Because no error exists in the Federal Circuit's decision with respect to the December 8 Order, nor does that decision conflict with any opinion of the circuit courts or of this Court, the Petition does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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